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IN THE

Supreme Court of the United States

ALLYN R. SIELAFF,
Director of the Virginia Department of Corrections,

Petitioner,

—v.—

CLIFFORD W. CARRIER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA IN SUPPORT OF THE RESPONDENT

BEST AVAILABLE COPY

LARRY W. YACKLE
Counsel of Record
Boston University
School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-4688

CHARLES S. SIMS
BURT NEUBORNE
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Counsel for Amici Curiae

10 pp

ISSUES PRESENTED

I.

Whether defense counsel's ignorance or negligence, falling short of a denial of effective assistance of counsel in the Sixth Amendment sense, can constitute "cause" for procedural default in state court within the meaning of Wainwright v. Sykes, 433 U.S. 72 (1977).

II.

Whether federal consideration of a prisoner's argument that counsel error constitutes "cause" in a particular case should be postponed until state remedies have been exhausted with respect to that issue.

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INTEREST OF

AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Virginia is one of the state affiliates.

The ACLU has long worked to protect the rights of criminal defendants and has filed many briefs, as counsel for a litigant or as amicus curiae, in cases requiring the construction of federal statutes and the interpretation of federal constitutional provisions related to criminal cases.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amici curiae.

STATEMENT OF THE CASE

This Court granted certiorari to decide whether the Court of Appeals correctly construed and applied the standards governing a state prisoner's access to federal habeas corpus for the adjudication of a federal claim that was not treated in state court because the state courts chose to rely upon an adequate and independent state procedural ground.

The prisoner, Clifford W. Carrier, was convicted in a Virginia court. At trial, his court-appointed attorney seasonably objected to the trial court's refusal to release to the defense certain witness statements in the hands of the prosecution. While the same complaint appeared in counsel's notice of appeal, it was omitted from counsel's brief to the Virginia Supreme Court. The record as it

now stands offers no explanation for the omission.

After the Virginia Supreme Court affirmed his conviction, the prisoner, proceeding pro se, sought state habeas corpus relief on the ground that the trial court's refusal to order the release of the witness statements constituted a violation of the due process clause of the Fourteenth Amendment. The warden moved to dismiss the petition because the due process claim might have been pursued on direct appeal. That motion was granted, and the Virginia Supreme Court denied review.

The prisoner again pressed the due process claim in a pro se petition for federal habeas relief, and, again, the warden moved to dismiss on the basis of procedural default. In an objection to a magistrate's recommendation that his petition be dismissed on that basis, the

prisoner alleged that the due process claim had not been raised on direct review because of "enefrective [sic] assistance of counsel." The district court accepted the magistrate's view that the state courts' reliance on procedural default to deny relief constituted an adequate and independent state ground of decision, making it inappropriate to entertain the claim in federal habeas in the absence of "cause" and "prejudice" within the meaning of Wainwright v. Sykes, 433 U.S. 72 (1977).[1] The district court also concluded that the prisoner could not complain that counsel's ineffective

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1 The "cause and prejudice" formulation in Sykes was fashioned for a case in which procedural default occurred at trial in state court, when the tactic known as "sandbagging" was at least conceivable. The default in this case occurred at the appellate stage, when counsel could no longer have been

assistance established "cause" because he had not exhausted state remedies with respect to that claim.

A panel of the Fourth Circuit reversed and remanded for a determination whether the prisoner could demonstrate "cause" arising from counsel's failure to pursue the due process claim on appeal, even

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"sandbagging" in the Sykes sense. All parties and all courts below have apparently assumed nonetheless that the "cause and prejudice" standards are applicable. With the case in this posture, and with no party having addressed this difficult question, it would be inappropriate to decide whether Sykes controls in a case of this kind. See Fay v. Noia, 372 U.S. 391 (1963)(employing the "deliberate bypass" rule in a case in which default occurred after trial); Reed v. Ross, 104 S.Ct. 2901, 2908 (invoking the "cause and prejudice" formulation in a case in which a state rule required "the exercise of legal expertise and judgment"). Cf. Mitchell v. Scully, 746 F.2d 951, 955-956 (2d Cir. 1984)(opinion of Friendly, J.)(preferring to reach the merits of a prisoner's claim rather than broach the question whether Sykes governs in a case in which the default was a

though counsel's inaction might not establish a violation of the Sixth Amendment. The panel's disposition was affirmed en banc. This Court granted the warden's petition for certiorari.

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failure to appeal directly from a criminal conviction). The stage at which default occurred in this case also makes it a poor vehicle for deciding what role the Sixth Amendment plays in habeas procedure. Cf. Evitts v. Lucey, 105 S.Ct. 830 (1985)(explaining that the source of counsel's performance standards on appeal is the due process clause).

We suggest, accordingly, that the writ be dismissed as improvidently granted. In the alternative, the Court may wish to remand to the Court of Appeals with instructions to return the case to the district court for thorough consideration of the appropriate standards for judging the federal effect of default at the appellate stage. Or the Court may wish to call for supplemental briefs. If the Court chooses to treat the Court of Appeals' analysis on the present record, it should be made clear that the applicability of the "cause" standard was not litigated below and is only assumed for purposes of the Court's opinion.

INTRODUCTION AND SUMMARY OF ARGUMENT

In general, litigants who put federal claims to the lower federal courts after those claims have been, or might have been, determined in prior state court litigation may expect to encounter arguments that relitigation is precluded. 28 U.S.C. § 1738. For more than a century, however, Congress has recognized federal habeas corpus as an exception to ordinary preclusion rules. Litigants who allege they are in custody in violation of federal law may litigate their federal claims in federal court as a sequel to state court proceedings. 28 U.S.C. §§ 2241-2254. The resulting framework is not without costs. Yet Congress has seen fit to engage those costs to ensure that habeas applicants have access to the federal forum.

Notwithstanding Congress' intention to make the federal forum available, this Court has held that the habeas courts may decline to open their doors in some instances in which litigants committed procedural default in state court and suffered dismissal on that adequate and independent state ground. In Sykes, the Court embraced the view that prisoners who forfeited state court opportunities to litigate because of procedural default may be foreclosed in federal habeas unless they demonstrate "cause" for the default and "prejudice" flowing from the federal error that went uncorrected in state court.[2]

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2 The idea of "cause" in the habeas context was originally borrowed from Rule 12 of the Federal Rules of Criminal Procedure. Davis v. United States, 411 U.S. 233 (1973). Rule 12 provides that criminal defendants forfeit the opportunity to litigate certain claims if objection

To date, the Court has not defined "cause" with precision--perhaps to avoid the rigidity that would follow an attempt to capture all possibilities in a fixed formula. Clearly, however, "cause" cannot be defined in a way that routinely bars state prisoners from the federal forum.

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was not made properly and seasonably in the trial court--except that for "cause shown" such defaults may be overlooked. The question, then, is whether the trial court is given some reason to grant relief from the forfeiture otherwise imposed by the Rule. In the typical case, "prejudice" to the accused establishes such a reason--"cause," that is, for permitting a litigant to pursue a claim notwithstanding procedural default.

In other cases, the Court has shifted the object of the "cause" inquiry in habeas away from a reason for granting relief from a forfeiture and toward a reason for the procedural default which invoked the forfeiture sanction in the first instance. Francis v. Henderson, 425 U.S. 536, 542 (1976); Sykes, 433 U.S. at 84. This transmutation of the "cause" idea typically focuses attention on the behavior of defense counsel.

The Court would do well to return to the original understanding of "cause," to

That would not only frustrate Congress' plan to provide habeas applicants with a second opportunity to litigate their federal claims, but would deny even a single opportunity to do so--the state courts having, by hypothesis, refused to treat those claims on the merits. Viewed

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merge the "cause" and "prejudice" inquiries, and, in the process, to eliminate the expenditure of federal resources otherwise required to identify "cause" apart from "prejudice." Should the Court find this course attractive, it would be appropriate to dismiss the writ in this case as improvidently granted, to remand with instructions to investigate the relationship between "cause" and "prejudice," or to call for supplemental briefs.

As this case now stands, it provides no occasion for refining the definition of "prejudice" as that term is currently used. We reserve comment on that question, whatever the relationship between "cause" and "prejudice."

realistically, a definition of "cause" which imposes a forfeiture of the federal forum as a matter of course when federal claims were not, but might have been, fully litigated in state court would give prior state proceedings the very preclusive effect that Congress has long forbidden.[3]

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[3] Kremer v. Chemical Constr. Corp., 456 U.S. 461, 485 n. 27 (1982)(recognizing Congress' intent to make habeas an exception to § 1738). Indeed, the preclusive effect would be more pronounced than anything this Court has recognized apart from habeas. Migra v. Warren City School Dist. Bd. of Educ., 104 S.Ct. 892, 898 n. 7 (1984)(indicating that "claim preclusion" rules may not be available for deployment against a federal plaintiff who was on the defensive in state court).

It hardly makes sense to propose that Congress means to free habeas corpus only from "issue preclusion" rules but to invoke "claim preclusion" rules against state prisoners--so that they are entitled either to two opportunities to litigate a federal claim or to none at all. Cf. Brown v. Allen, 344 U.S. 443, 552 (1953)(Black, J.). As cases such as Migra make clear, Congress must fairly be understood to hesitate more over rules which prevent litigation in any forum than over those

Procedural default is typically the product of defense counsel's behavior. The ascription of responsibility to counsel is, however, only the beginning of the inquiry in "cause" cases. No one doubts that "cause" is shown if counsel's failure to comply with state procedural rules constituted a denial of the defendant's independent Sixth Amendment right

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which force litigants to accept the judgment of the courts they initially approach. Inasmuch, then, as Congress plainly intends that habeas applicants be permitted a second opportunity to litigate, it strains common sense to suggest that the routine preclusion of claims that were not treated in state court is within Congress' contemplation.

to effective assistance of counsel.[4] In cases of that kind, indeed, the search for "cause" is beside the point; having established a violation of the Sixth Amendment, the prisoner is entitled to habeas relief on that ground--wholly apart from any other federal claim that counsel failed to raise in state court.

In the case at bar, the warden proposes something quite different. A Sixth Amendment violation, according to his

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4 There is language in some lower court opinions suggesting that an "allegation" of ineffective assistance will not establish "cause" for procedural default. E.g., Lumpkin v. Ricketts, 551 F.2d 680, 686 (5th Cir. 1977). The point is unexceptional. The mere "allegation" of counsel error could at most generate a dispute between the parties in habeas, which would then be resolved in appropriate federal proceedings. E.g., Goodwin v. Balkcom, 684 F.2d 794, 808-809 n. 17 (11th Cir. 1982)(distinguishing Lumpkin from a case in which ineffective assistance in the Sixtn Amendment sense is not only "alleged" but demonstrated).

argument, is not only sufficient to establish "cause"; it is essential. Specifically, the warden contends that defense counsel's ignorance or negligence cannot constitute "cause" unless the same behavior also denied the prisoner effective assistance in the Sixth Amendment sense. Furthermore, the warden insists that habeas litigants must exhaust state remedies with respect to any contention that counsel error establishes "cause" for procedural default in state court. Neither argument can be sustained.

In Part I of our argument, we explain that the proposed merger of the search for "cause" and an independent violation of the Sixth Amendment fails for a variety of reasons. It neglects the different concerns which generate Sixth Amendment doctrine, ignores precedents in which this

Court has found "cause" in the absence of a Sixth Amendment violation, renders the Court's line of procedural default decisions superfluous, creates serious doctrinal confusion, and threatens the objectives the Court has expressly pursued in the Sixth Amendment context.

We embrace the Court's consistent avoidance of rigid rules in this field, but suggest that the Court clarify both the relationship between "cause" and the Sixth Amendment and the way in which the distinction between deliberate, strategic actions and defaults due to ignorance or negligence figures in a proper analysis of "cause." We explain that the considerations which gave birth to the "cause" inquiry indicate that federal habeas corpus should be foreclosed only in some instances in which default

was the product of counsel's deliberate, knowing strategy.

In Part II, we agree that habeas applicants who raise Sixth Amendment claims as the basis for relief must ordinarily exhaust state remedies with respect to those substantive claims. We explain, however, that the exhaustion doctrine has no role regarding the different question whether counsel error establishes "cause." The federal question whether "cause" is shown belongs to the federal habeas courts' management of their own gates. The state courts have no interest in that issue; none of the values served by the exhaustion doctrine relates to it.

ARGUMENT

I. DEFENSE COUNSEL'S IGNORANCE OR NEGLIGENCE, FALLING SHORT OF A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL IN THE SIXTH AMENDMENT SENSE, CAN CONSTITUTE "CAUSE" WITHIN THE MEANING OF SYKES

A. The Error of Merging "Cause" with a Substantive Violation of the Sixth Amendment

This case provides an opportunity to return to an issue left open in Sykes: "How should the federal habeas courts treat a state procedural default that is attributable purely and simply to the error or negligence of a defendant's trial counsel?" 433 U.S. at 100 (Brennan, J., dissenting). The warden's answer is deceptively simple. A federal habeas court should refuse to consider a prisoner's federal claim unless counsel's ignorance or negligence was so egregious as to amount to

a denial of the prisoner's Sixth Amendment right to effective assistance of counsel. Such a proposition cannot be credited.[5]

The Sixth Amendment standards against which defense counsel's actions must be measured were fashioned for an entirely different purpose and in response to entirely different concerns. The paramount question in a Sixth Amendment case is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on

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[5] Although the default in Sykes arose from defense counsel's behavior, the Court did not squarely consider whether the prisoner would be bound by an attorney's ignorance or negligence. Moreover, since the prisoner in Sykes expressly disclaimed any contention that counsel had rendered ineffective assistance at trial, the Court had no occasion to explore the relationship between "cause" and the Sixth Amendment. 433 U.S. at 75 n. 4. In Sykes, indeed, the prisoner offered no explanation at all for counsel's omission. Accord Davis v. United States, 411 U.S. 233, 243 (1973).

as having produced a just result." Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). The standards are admittedly low; judicial scrutiny of counsel's behavior is "highly deferential." Id. at 2065.

This Court explained in Washington that higher, more precise standards might undermine counsel's independence, restrict the range of counsel's tactical choices, encourage a proliferation of Sixth Amendment claims, dampen counsel's ardor, and undermine the trust between attorney and client. The Court also pointed out that it is difficult for reviewing courts to reconstruct the circumstances as they appeared to counsel and to distinguish incompetence from unsuccessful strategic maneuvers without "the distorting effects of hindsight." Id. The working idea in

Sixth Amendment cases, accordingly, is to establish and maintain a deferential posture with respect to counsel's actions and to identify constitutional error only when it appears counsel's misbehavior undermined the reliability of the defendant's conviction.

None of the considerations which inform the Court's treatment of Sixth Amendment claims is material to the entirely different question whether counsel's ignorance or oversight can constitute "cause" within the meaning of Sykes. Here, the question is not whether counsel's behavior met reasonable professional standards or, certainly, whether the prisoner must be accorded a new trial. The issue, rather, is whether a different federal claim, unrelated substantively to

counsel's performance, is to be denied a hearing in the federal forum.

Close scrutiny of counsel's behavior may arguably generate the difficulties the Court identified in Washington if the effect of federal second-guessing is the disapproval of counsel's work and the vacation of the conviction. When, however, the only consequence of finding "cause" is that a federal court will entertain an unrelated constitutional claim, those problems are not presented. To put the matter bluntly, the costs that flow from a finding of "cause" are dramatically lower than the costs of identifying a Sixth Amendment violation--requiring a new trial without more.

It is hardly surprising, then, that this Court has already found "cause" in the absence of a Sixth Amendment violation.

Only last Term in Reed v. Ross, 104 S.Ct. 2901 (1984), the Court held that the novelty of a legal theory at the time it might have been pursued in state court constituted "cause" for counsel's failure to raise it. None of the three opinions written in Ross suggested that the attorney in that case had failed to meet Sixth Amendment standards; indeed, the majority concluded that counsel had acted reasonably. Id. at 2910.

In Francis v. Henderson, 425 U.S. 536 (1976), the lower courts located "cause" in defense counsel's inexperience in criminal cases. Newman v. Henderson, 496 F.2d 896, 897-898 (5th Cir. 1974). This Court affirmed. While the Court focused on the question whether the prisoner must demonstrate "prejudice" as well as "cause" and thus did not deal explicitly with the

"cause" determination below, it hardly seems plausible that the Court would have sustained the circuit court if that court had misconceived the meaning of "cause." Cf. Estelle v. Smith, 451 U.S. 454, 468 n. 12 (1981)(rejecting a warden's procedural default argument "for the reasons stated by the Court of Appeals"); Smith v. Estelle, 602 F.2d 694, 708 n. 19 (5th Cir. 1979)(relying in part on two excuses for counsel's failure to raise a claim--neither of which touched upon the Sixth Amendment).

The warden's proposed merger of "cause" with a violation of the Sixth Amendment would make all the Court's cases on the effect of procedural default superfluous. For if a prisoner can establish an independent Sixth Amendment claim, habeas relief must be awarded without regard to

other federal claims that might have been, but were not, treated in state court. The point of the "cause" inquiry is to decide whether federal habeas courts will entertain federal claims that counsel's error kept from the state courts, not to make it immaterial whether those claims are examined.[6]

The argument urged on the Court today would collapse everything the Court has said about procedural default (from Brown v. Allen, 344 U.S. 443 (1953), through Fay

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[6] There are instances in which it would be important to dig beneath a meritorious Sixth Amendment claim and to reach the merits of the federal claim that counsel failed to raise in state court. The state may cure Sixth Amendment error by according petitioners another trial; some errors, in contrast, cannot be cured. In some former jeopardy cases, for example, prisoners should be entitled to litigate claims that counsel did not raise--in order to obtain release with prejudice to further state proceedings. E.g., Grandberry v. Bonner, 653 F.2d 1010, 1011 (5th Cir. 1981).

v. Noia, 372 U.S. 391 (1963), to Sykes, Isaac, and Ross) into substantive Sixth Amendment law. If the Court has meant for thirty years that the only federal claims cognizable in habeas are Sixth Amendment claims, it hardly would have erected the elaborate framework we have today--ostensibly for the purpose of deciding when other claims should be entertained notwithstanding a prisoner's inability to establish a Sixth Amendment violation.

The importation of Sixth Amendment standards into the definition of "cause" would also generate doctrinal confusion. The Court has made it clear that habeas applicants wishing to overcome default in state court must show both "cause" and "prejudice" flowing from the error that, because of default, went uncorrected in state court. The Court said in Washington

that litigants claiming violation of the Sixth Amendment must in most instances demonstrate not only that counsel's performance "fell below an objective standard of reasonableness," but that the defense was "prejudiced." 104 S.Ct. at 2065. If the Court were to incorporate Washington (including both "performance" and "prejudice" components) into the determination of "cause," habeas courts would be required to make two "prejudice" determinations--one to identify a Sixth Amendment violation establishing "cause" and another to satisfy the second prong of the "cause and prejudice" formulation. See, e.g., Tsirizotakis v. LeFevre, 736 F.2d 57 (2d Cir. 1984)(purporting to make two such determinations in a single case). Within a framework already criticized for

undue complexity, such a result would be impossible to justify.

Nor would it be plausible to borrow only the "performance" component of Washington as the measure of "cause" and to assimilate both "prejudice" questions into a single inquiry into the effect of counsel's oversight. Any attempt to substitute Sixth Amendment performance standards for a frank search for "cause" would be inconsistent with the well-settled understanding that isolated mistakes by counsel are usually insufficient to make out a Sixth Amendment violation. While "specific errors and omissions may be the focus" in some Sixth Amendment cases, United States v. Cronic, 104 S.Ct. 2039, 2046 n. 20 (1984), the primary issue in a Sixth Amendment case is typically whether counsel's behavior on the whole was so

unreasonable as to deprive the proceedings of their adversary character and to deny the client a fair trial. Counsel's failure to raise a particular claim seasonably in state court will rarely suffice--even if the result is procedural default under state law which works a forfeiture of any opportunity to litigate the underlying claim in further state proceedings.

If this Court were to hold that such defaults must constitute ineffective assistance to avoid similar forfeiture in federal habeas, the paradoxical signal to litigants and lower courts would be clear. Habeas applicants would be given an incentive to argue that isolated defaults by counsel establish Sixth Amendment violations. The lower courts, faced with the alternative of turning away facially meritorious constitutional claims, would be

pressured to sustain prisoners' arguments. For if this Court declared that the Sixth Amendment provides the applicable standard for the "cause" determination, the lower courts must assume that that standard will be met in some cases.

In the end, a holding that a Sixth Amendment violation must be established would encourage Sixth Amendment arguments precisely where they are now discouraged--cases in which it can only be shown that counsel overlooked an opportunity to raise a federal claim seasonably in state court. The analysis the Court has attempted to engender--an examination of counsel's overall performance as it relates to a fair and adversarial trial, would be skewed lest patent constitutional violations go uncorrected.

An attempt to collapse "prejudice"

within the meaning of Sykes into "prejudice" with the meaning of Washington would suffer similar frustration. The definitions of "prejudice" in these two contexts are and should be distinct. Compare Ross, 104 S.Ct. at 2908 (stating that "prejudice" within the meaning of Sykes is shown if, but for the default, the prisoner "might not have been convicted")(emphasis supplied), with Washington, 104 S.Ct. at 2068 (holding that "prejudice" in the Sixth Amendment sense is demonstrated only when there is a "reasonable probability" that, but for counsel's mistakes, the result "would have been different")(emphasis supplied).

This is only to be expected, given that the reasons for asking about "effects" in the two situations are quite different. The "prejudice" inquiry in the Sixth

Amendment context is undertaken to identify counsel mistakes which deprived the proceedings against the defendant of the adversarial character on which the system depends to ensure reliable results and which, accordingly, warrant overturning a criminal conviction. The paramount question, then, is whether the proceedings to date support a confident judgment that the defendant is guilty beyond a reasonable doubt.

In the habeas context, in contrast, "prejudice" is relevant only to a decision whether a federal court should exercise its equitable discretion to forego the exercise of jurisdiction squarely granted by Congress. The question in habeas is whether the prisoner should be allowed access to federal court for the litigation of a federal claim which, by hypothesis,

has never been treated in any other forum. It is most unlikely that these quite different objectives could be served by the same test for "prejudice."

B. The Proper Relationship Between Defense Counsel's Performance and "Cause"

The Court has previously avoided spelling out the explanations for default that will constitute "cause," and we see no greater reason to issue an exhaustive "guideline" opinion in this case. Cf. Sanders v. United States, 373 U.S. 1, 23 (1963)(Harlan, J., dissenting). It would be appropriate, however, to make several basic points to assist the lower courts in implementing Sykes while at the same time respecting, as the Court must, Congress' core expectation that state prisoners have access to the federal forum.

The key is to understand "cause" against the background of the concern which gave rise to that idea in the first instance. That concern is that the federal courts' availability for the litigation of federal issues should not undercut state attempts to secure compliance with state procedural rules. If the federal courts were to take no account of procedural default in state court, Sykes reasoned, defense counsel might be encouraged to engage in "sandbagging." That strategy, put simply, is deliberately to build federal error into state proceedings, to hope that the defendant will be acquitted anyway, but then to raise suppressed federal claims in habeas corpus later if the client is convicted.

Consistent with this reasoning, the habeas courts should decline to find

"cause" when barring federal litigation will deter counsel from "sandbagging" the state courts. Inasmuch as "sandbagging" is clearly a deliberate undertaking, it is arguably possible to deter it with a forfeiture sanction. Accordingly, counsel's deliberate, tactical maneuvers will not ordinarily suffice for "cause."

We understand Sykes to mean, at bottom, that prisoners may in some instances be held responsible for their attorneys' intentional tactics in state court--whether or not the prisoners themselves participated in those decisions. The only exceptions, it seems, are cases in which counsel's behavior dipped below Sixth Amendment standards[7] and cases in which counsel's deliberate choices were so "grissly" that it would be inappropriate to

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[7] See Garrison v. McCartny, 653 F.2d 374, 378 (9th Cir. 1981).

withhold federal review.[8]

Defaults flowing from counsel's ignorance or negligence cannot be deterred in the same way. Cf. United States v. Leon, 104 S.Ct. 3405 (1984). Barring federal habeas corpus on the basis of unintentional default in state court would add nothing to state attempts to encourage compliance with state procedures, but would most certainly frustrate Congress' plan to make the federal forum routinely available.

The root idea in Sykes is that habeas may be rationed to channel counsel's behavior into the appropriate tracks. The imposition of a forfeiture sanction in cases in which counsel were unaware of claims or the need to raise them in a particular way or at a particular

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[8] Sykes, 433 U.S. at 95 n. 3 (Stevens, J., concurring).

time, or cases in which counsel merely overlooked points or procedures of which they were generally cognizant, would come to something quite different--a bald value judgment, forged by the Court alone in the teeth of Congress' plan, that the federal forum should not be available to prisoners unlucky enough to be represented by inattentive lawyers.[9] Cf. Patsy v. Bd. of Regents, 457 U.S. 496 (1982)(conforming to Congress' wishes notwithstanding the Court's own doubts).

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9 Other considerations mentioned in Sykes as reasons for reinforcing state contemporaneous objection rules (the encouragement of litigants to raise claims when the evidence is fresh, the maintenance of "finality" in criminal cases, and the identification of the criminal trial as the "main event" in criminal prosecutions) are consistent with the view that unintentional behavior should not cut off federal review. The first assumes deliberate action; the other two are neutral with respect to the vital (intentional-unintentional) distinction which informs the Court's primary concern regarding "sandbagging."

This bleak picture cannot be avoided by resort to the fiction that counsel's failure to raise claims properly is generally deliberate and strategic. That simply is not true. To draw an inference of strategic behavior from counsel's omissions would plainly be to impute something to lawyers in a highly fictitious, formalistic fashion--without empirical support in any known data. It would only mask, and mask very transparently, a substantive decision to withdraw the federal forum arbitrarily from the very litigants whose (usually appointed) lawyers are functioning least well. These litigants are hardly able to enter the market to purchase better representation.

The Court has never embraced any such crude ideas. On the contrary, the Court has explained that the search for "cause" ordinarily will demand a serious

examination of the peculiar facts in each case. Jenkins v. Anderson, 447 U.S. 231, 234 n. 1 (1980). Logical inferences from counsel's behavior may well suggest deliberate strategy on occasion; direct testimony may lead in the same or a different direction. The task, in all cases, is to discover the historical facts by ordinary means, without reference to blanket rules that only smother the search for truth.[10]

The upshot is that, contrary to the district court's behavior in this case, the "cause" issue can rarely be determined on the face of prisoners' habeas applications--particularly if they

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10 The Court's analysis in the Sixth Amendment context does contemplate a "presumption" that counsel's behavior was tactical. Yet the values, and certainly the stakes, in that context are quite different--for reasons given above. Here the Court is not elaborating the constitutional minimal professional representation to which defendants are entitled, but is only clarifying a judge-made exception to a "head" of federal jurisdiction established by Congress.

are filed pro se. The federal habeas courts can, of course, draw attention to the "cause" issue and ask for clarification, additional allegations, or offers of proof. It may well be possible in some instances to reach a judgment on the existence of "cause" without holding an evidentiary hearing. Yet in the end it is essential that the fact-bound question of "cause" be determined in federal court through ordinary mecnanisms for making sensitive decisions of this kind.

C. The Meaning to be Drawn from Engle v. Isaac, 456 U.S. 107 (1982)

The warden relies on this Court's treatment of three consolidated cases, determined in the single opinion in Isaac. Counsel in those cases had failed to enter

a contemporaneous objection to an allegedly unconstitutional jury instruction and, for that reason, their clients had forfeited the opportunity to litigate that claim further in state court. In federal habeas, the prisoners contended, first, that the "futility" of the claim against the jury instruction at the time of trial established "cause" for counsel's failure to raise it, and, second, that "cause" was established by counsel's ignorance or negligence in failing to recognize that the jury instruction was vulnerable to federal attack on a novel theory.

The Court disposed of the first argument summarily--but in language which plainly contemplated that counsel's failure to raise a claim because of its perceived "futility" necessarily contemplated an awareness of the claim's existence: "If a

defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." 456 U.S. at 130.

Accompanying footnotes drove home the point that the Court's discussion of "futility" addressed only deliberate action by counsel. The Court quoted Justice Powell's concurring opinion in Estelle v. Williams, 425 U.S. 501 (1976), to the effect that counsel could not be allowed "deliberately to forego objection to a curable trial defect," id. at 515 (emphasis added), and recalled that even the Court's decision in Noia had condemned the "deliberate bypass" of state remedies.

U.S. at 130 nn. 35-36.[11]

The Court also rejected the claim that counsel's ignorance of a novel claim established "cause" in the cases at bar. Reviewing the case law at the time of the prisoners' trials, the Court concluded that counsel had had the "tools" with which to

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11 Even so, the Court in Issac refused to say that the apparent futility of a claim would never support a finding of "cause." 456 U.S. at 131 (stating that the Court "might hesitate to adopt a rule that would require trial counsel...to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim").

construct the argument. Then the Court said this:

> We do not suggest that every astute counsel would have [raised the federal challenge to the jury instruction]....Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit [this particular claim]...while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable consitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as a cause for procedural default. Id. at 133-134.

This passage addressed two analytically distinct matters. The key to its interpretation is to identify when it left the one for the other. That can be done only against the background of the brief filed on behalf of the prisoner in one of

the consolidated cases, Perini v. Bell. That brief dealt with defense counsel's ignorance of the federal claim in two ways. First, it argued that if the law was clear enough at the time of trial to put competent counsel on notice of a federal claim, then, in the absence of evidence of some tactical purpose, counsel's failure to raise that claim in season constituted ineffective assistance of counsel in the Sixth Amendment sense--which, in turn, established "cause." Second, whatever the claim's stage of development, counsel's ignorance of it established "cause" apart from the Sixth Amendment.

The quoted passage from the Court's opinion responded to both these contentions. The first five sentences addressed Bell's Sixth Amendment claim and found it wanting. Counsel's isolated

mistake in failing to raise a particular claim did not render his representation ineffective.[12] This was not to say, of course, that "cause" could not be shown without establishing a violation of the

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12 In this, the Court rejected the misleading syllogism that has occasionally obscured clear thinking in change-of-law cases. It is said that those who, like the ACLU, would locate "cause" in counsel's unintentional defaults mean to preserve the federal forum no matter what happened in state court. If a claim was known at the time it might have been raised in state court, then we insist that counsel's failure to raise it must have amounted to ineffective assistance in the Sixth Amendment sense and that "cause" should be found on that basis. Yet if the claim was not yet developed at the critical time, we insist that counsel's failure to raise it was understandable and, again, "cause" should be found. The Court's response, according to this account, should be to accept the syllogism in its own terms, to find "cause" only when counsel's error constituted a violation of the Sixth Amendment or when counsel made no error at all, but then to refuse to hold that an isolated failure to raise a generally known claim amounts to ineffective assistance in the Sixth Amendment sense. The result, of course, would be to limit "cause" to rare

Sixth Amendment. It was only to deny that "cause" was established in Bell on the basis of a meritorious Sixth Amendment argument.

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cases in which counsel either behaved very badly (in violation of the Sixth Amendment) or very well (making no error at all).

This proposal both misstates our argument in cases of this kind and understates the complexities with which the federal habeas courts must grapple. We do argue that "cause" should be found at the extremes--when counsel's error constituted a violation of the Sixth Amendment or when counsel made no error. Yet we hardly contend that every failure to raise a generally known claim amounts to ineffective assistance in the Sixth Amendment sense. There is a broad middle ground between the extremes. That ground is occupied both by counsel's deliberate, strategic omissions (regarding which "cause" ordinarily will not be found) and counsel's negligence or ignorance respecting generally known claims (regarding which "cause" should be found).

To overlook these distinctions, to suggest that all counsel error is either in violation of the Sixth Amendment or the basis for cutting off the federal forum, is both to ignore the reasoning which gave rise to the "cause" inquiry in the first instance and to frustrate the jurisdictional framework Congress has put in place for state prisoners.

The last sentence addressed Bell's argument that counsel's ignorance established "cause." Here, the Court's previous holding that the claim was generally known at the time of trial was critical. In the particular circumstances at bar, the Court was not prepared to accept the "allegation" that counsel had actually been unaware of the claim. The Court said nothing to suggest that in other circumstances, when the evidence in support of ignorance is stronger, "cause" will not be found. The Court, indeed, flatly refused to require lawyers to have "extraordinary vision." Id. at 131.

More recently, in Ross, counsel's ignorance has squarely been held to establish "cause." 104 S.Ct. at 2909 (stating that "the cause requirement may be satisfied under certain circumstances when

a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interest").

Read closely and in full, the opinion in Issac hardly supports the warden's position in this case. The Court there dealt only with the particular arguments put by the parties in the particular circumstances of the cases before the bar. When the Court turned to the general definition of "cause," it expressly declined to paint with the broad brush the warden in this case insists was used. Id. at 1562 (intimating no intention to fill gaps left by Sykes). That prudent course should be followed again here. In this case, the Court need only clarify that

unintentional defaults by counsel do not bar the federal court house door.[13]

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13 We note as an aside that in the course of collecting the "costs" of postconviction habeas, the Court in Isaac mentioned in a footnote that counsel's failure to raise federal claims seasonably is sometimes due to ignorance and sometimes to deliberate strategy--as in the case of "sandbagging." 456 U.S. at 129 n. 34. That descriptive statement was clearly accurate. Yet the mention of both intentional and unintentional defaults in one paragraph scarcely suggested that the two would have the same effect on the

II. FEDERAL CONSIDERATION OF A PRISONER'S ARGUMENT THAT COUNSEL ERROR CONSTITUTES "CAUSE" SHOULD NOT BE POSTPONED UNTIL STATE REMEDIES HAVE BEEN EXHAUSTED WITH RESPECT TO THAT ISSUE

The exhaustion issue in this case is something of a red herring. As the Court of Appeals correctly pointed out below, state prisoners are ordinarily required to exhaust state remedies only with regard to their substantive claims for federal relief. The controlling statute explains that habeas is available only to prisoners

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availability of the federal forum. On the contrary, the Court was merely acknowledging that counsel's defaults are not always the consequence of "sandbagging"--the kind of behavior that does cut off federal review.

claiming a right to relief on the "ground" that they are in custody in violation of federal law and then refers to the use of state opportunities to raise "the question presented." 28 U.S.C. § 2254(a), (c). From the earliest cases, notably Ex parte Royall, 117 U.S. 241, 250-251 (1886), to the present, this Court's cases have plainly limited the exhaustion doctrine to claims "in a habeas corpus petition." Rose v. Lundy, 455 U.S. 509, 515 (1982)(emphasis supplied).

The warden would have it, however, that the exhaustion doctrine somehow relates to the matter of "cause." Even putting aside the absence of any support for such an argument in positive law, a moment's consideration reveals that it also lacks support in the exhaustion doctrine's rationales. As the Court explained in

Lundy, exhaustion is usually demanded to protect the state courts' role in the enforcement of federal law, particularly constitutional law, and to prevent disruption of state judicial proceedings. Id. at 518. State judges are sworn to uphold the Constitution; there may be great value in maintaining their role in the treatment of substantive claims which challenge the validity of state convictions. But the state courts have no interest in being involved in determinations that have only to do with federal gate-keeping. Just as they have no role to play in determining whether their grounds of decision are "adequate and independent" in the federal sense, and therefore sufficient to interdict Supreme Court direct review or to bring Sykes into play in habeas, they have no place in the search for "cause." The availability of

the federal habeas forum is a matter left, by statute and precedent, wholly to the federal courts.

Nor does the determination of "cause" relate to the proper functioning of state judicial proces s. As the Court explained in Royall, early federal intervention to evaluate state criminal defendants' federal claims touching the proceedings against them might disrupt the state courts' attempts to enforce the criminal law efficiently and, in the process, to attend to defendants' federal defenses. The matter of "cause," however, never arises in state proceedings. It is never presented for federal decision until state courts have finished their work. The concern lest federal habeas interfere with the state courts simply does not arise with respect to the "cause" issue.

The warden's reference to Alcorn v. Smith, 724 F.2d 37 (6th Cir. 1983), suggests a quite different argument. The Sixth Circuit did not propose in Alcorn that state remedies must be exhausted with respect to the federal question of "cause," but only noted that state prisoners' ordinary duty to present their substantive claims to the highest state court contemplates that they raise in state court any available state law bases for avoiding a forfeiture sanction for procedural default.

We do not discount the root idea in Alcorn. Would-be habeas applicants often have several avenues by which to satisfy the exhaustion doctrine; in most instances, it is a matter of federal indifference which path is chosen. If, however, prisoners fail to employ the procedures the state courts would prefer them to use, it

is common to find the exhaustion doctrine unsatisfied and to channel them back to state court and more appropriate remedies. E.g., Pitchess v. Davis, 421 U.S. 482 (1975) (finding an application for a state writ of prohibition no substitute for direct appeal).

The prisoner in Alcorn had squarely presented his substantive federal claim to the Kentucky Supreme Court on direct review, but that court had refused to consider it because of procedural default at trial. The prisoner filed a motion for rehearing alleging that the default was the result of counsel error and that it should, accordingly, be overlooked. That argument, too, was judged to be too late--but only inasmuch as it was raised in the form of a motion for rehearing at the appellate level.

The same allegation of counsel error might have been raised, according to the

Sixth Circuit, in a postconviction motion at the trial court level pursuant to Kentucky's ordinary postconviction remedy rule. Since that avenue was apparently still open, providing a means by which the prisoner might yet litigate his underlying federal claim in state court, the Sixth Circuit ordered his petition dismissed without prejudice to further federal proceedings after the prisoner had sought relief in the state courts in this conventional manner.

We have no substantial quarrel with Alcorn. If in the case at bar the warden means only that the prisoner should be asked to employ available and effective state court opportunities to persuade the state courts to overlook his attorney's default, then we can identify no threat to the congressional plan for protecting Mr. Carrier's genuine interests. Delays in

litigation are vexing in any circumstances, and a federal habeas court should think hard about requiring prisoners to make repeated trips to the state courts and, in the end, back to the federal forum. At some point, neither the interests of the prisoner nor the warden are served by making a fetish of exhaustion. Cf. Washington, 104 S.Ct. at 2060 (reaffirming that exhaustion is not jurisdictional).

Yet we are reconciled to the view that a prisoner whose substantive federal claim appears to be procedurally barred under state law may be called upon to present to the state courts, by reasonably identifiable means, a state law basis for overlooking default and reaching the merits. This appears to be the core lesson to be drawn from Pitchess and similar cases.

We leave to the parties and the district court the question whether such a state court opportunity remains open in this instance. Our concern is only to make clear that in no event is such further resort to the state courts to be understood as the exhaustion of state remedies with respect to the federal question of "cause." State law may well recognize exceptions to the ordinary forfeiture sanction in circumstances which mirror those associated with "cause" in federal habeas. The issue in state court is, however, one of state law alone. It is relevant to the availability of subsequent litigation in the federal forum only insofar as the state courts' use of the forfeiture sanction for default, and any exceptions, will be examined to determine the threshold federal question whether any

resulting state procedural ground is adequate and independent.[14]

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[14] It would be premature to speculate on the federal impact of any state court refusal to entertain Carrier's argument that his attorney's default should be overlooked pursuant to a state law exception to the ordinary procedural default/forfeiture rule. Indeed, if the warden is really arguing in this Court that the state courts remain open to such a contention, it would be inconsistent on his part even to make a procedural default argument in state court should the prisoner be routed back there. The warden's exhaustion argument has merit only insofar as it contends that federal habeas consideration of the prisoner's substantive claim should be postponed--not that federal review is forfeited.

We point out, however, that if the prisoner were forced to return to state court and were to be turned away yet again, this time because he committed procedural default in a second way by neglecting to present the state courts with a state law argument for overlooking counsel's anterior default, it would be far from clear that that state procedural ground of decision would invoke Sykes, such that the federal habeas court below would then ask the prisoner to show "cause" and "prejudice" with respect to his failure to raise a state law argument for avoiding dismissal for earlier default regarding a federal claim.

CONCLUSION

For the reasons given in notes 1 and 2, supra, we urge the Court to dismiss the writ as improvidently granted, to remand with instructions, or to call for supplemental briefs. In the alternative, we urge the Court to affirm the Court of Appeals' judgment. This case should be remanded to the district court. That court should first address the warden's argument that the prisoner has not yet exnausted

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Nothing in Sykes suggests that concerns about "sandbagging" could conceivably reach so far. In the typical case, prisoners can perceive no tactical advantage whatever in raising a federal claim in state court in a self-evident attempt to have it heard notwithstanding earlier procedural default, but withholding a state law argument for overlooking that default and treating the merits. The real explanation for default at this advanced stage is plain enough: counsel's ignorance or negligence.

There comes a time when efforts to respect comity and federalism, and the underlying values associated with them, give way to common sense. It would be

state court opportunities to persuade the state courts to overlook his attorney's default and to reach the merits of his federal claim. Issues of that kind are best treated at the district level, where a federal judge close to the parties, the case, and the state remedies that allegedly remain open can decide whether the values associated with the exhaustion doctrine would be served by routing this prisoner back to the state courts.

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sheer folly to order a federal district court to make <u>two</u> investigations of "cause" and "prejudice" (one to determine whether the prisoner should be barred from the federal forum for committing default regarding state law means of litigating federal issues and the other to determine whether, default respecting state law issues to one side, he should be barred for counsel's anterior default regarding an underlying federal claim for habeas relief).

Second, laying the exhaustion issue aside, the district court should investigate the facts and determine whether appellate counsel's failure to include the prisoner's due process claim in his brief on direct review in state court should bar federal habeas adjudication of that underlying claim. The primary question is why counsel acted as he did. If his omission was a deliberate strategy, "cause" should be found if his behavior constituted ineffective assistance of counsel in the Sixth Amendment sense. If he acted negligently or in ignorance, "cause" should be found without reference to the Sixth Amendment.

Should the Court wish to be more specific, we suggest the following formulation: The district courts should find "cause" within the meaning of Sykes if procedural default in state court can be

ascribed to counsel's ignorance, negligence, or inadvertence in failing to recognize and to fully appreciate the significance of a federal claim and its factual predicate, any state law requirements that the claim be raised at a particular stage of state proceedings or in any particular manner, or the consequences of failing to comply with any such state procedural requirements.

Respectfully submitted,

LARRY W. YACKLE
Counsel of Record

CHARLES S. SIMS
BURT NEUBORNE
Counsel for Amici Curiae